

**United States Department of Labor
Employees' Compensation Appeals Board**

P.K., Appellant

and

**DEPARTMENT OF THE INTERIOR,
U.S. FISH & WILDLIFE SERVICE,
Randlett, UT, Employer**

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**Docket No. 12-46
Issued: May 11, 2012**

Appearances:

*David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 11, 2011 appellant, through his representative, filed a timely appeal from the July 22, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied reconsideration. As more than 180 days elapsed from issuance of OWCP's February 2, 2011 merit decision to the filing of the appeal on October 11, 2011, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review only the nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's February 2, 2011 reconsideration request under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 3, 2004 appellant, a 44-year-old maintenance worker, sustained a traumatic injury in the performance of duty while loading scrap pipe. OWCP accepted his claim for lumbar spinal stenosis and disc protrusion at L4-5 and L5-S1.

In a November 20, 2009 decision, OWCP reduced appellant's compensation for wage loss on the grounds that he was no longer totally disabled but rather was partially disabled and had the capacity to earn wages in the constructed position of customer service representative. It noted that the attending Board-certified orthopedic surgeon, Dr. Burk T. Young, found appellant at maximum medical improvement with some limitations, but he neglected to complete a work capacity evaluation describing those limitations. OWCP gave the weight of the medical evidence to a second-opinion physician who provided permanent work restrictions on November 6, 2008: appellant could return to work for four hours a day, increasing an hour each month to eight hours a day; and he could sit for four to six hours.

OWCP noted that the employer was not able to provide work within appellant's permanent restrictions. It also noted that the vocational rehabilitation counselor tried to work with appellant, but he failed to show up for an appointment on June 10, 2009, failed to complete his initial vocational testing, leaving after only one hour; and failed to complete and return his work and education history sheet. The rehabilitation counselor documented the suitability and availability of the position, as well as the entry pay level. OWCP described the duties and physical requirements of the position, noting that the latter did not exceed appellant's accepted work tolerance limitations. It found that the position of customer service representative was medically and vocationally suitable and fairly and reasonably represented appellant's wage-earning capacity.

Appellant's representative requested reconsideration. He argued that appellant's medical condition was getting worse; he was not able to work on a full-time, sustained, continuous basis. Appellant's representative also argued that appellant did not engage in obstruction and was interested in exploring all reasonable means by which he might be able to return to the workforce. He contended that OWCP had not established that appellant could work in his former job or in some other job.

On February 2, 2011 OWCP granted appellant's request for reconsideration and reviewed the merits of his case. It found that the medical evidence did not support appellant's argument that his condition had worsened. OWCP noted that the most recent imaging study in 2010 specifically stated that there were no new abnormalities and no unfavorable changes since the previous study in 2007. It also found that appellant's representative did not have the benefit of a complete factual history when he argued that appellant did not obstruct vocational rehabilitation efforts. OWCP provided a vocational rehabilitation memorandum documenting the actions that were viewed as obstructive. It concluded that there was no evidence to support any of the three grounds that would warrant modification of the wage-earning capacity determination.

On June 16, 2011 appellant's representative requested reconsideration. He reiterated that appellant did not engage in obstructive behavior. Appellant's representative challenged the vocational rehabilitation memorandum, and the decision it produced, as skewed and incorrect.

He submitted a timeline to show that there was a genuine dispute of material fact as to whether appellant tried to cooperate or was obstructive.

Appellant's representative again argued that appellant's medical condition had worsened. Although the 2010 imaging study showed no new abnormalities or unfavorable changes, he argued that such a study does not show pain or functional deficits, and it was appellant's testimony that his pain and functional deficits had become worse, which was not unreasonable given his age and lack of mobility.

Appellant's representative submitted a September 3, 2008 work capacity evaluation completed by Dr. Young, which described appellant's permanent work restrictions: appellant could not work 8 hours a day; he could sit for 30 minutes but would then have to move.

In a July 22, 2011 decision, OWCP denied appellant's reconsideration request without reviewing the merits of his case. It found that the request did not meet the criteria for obtaining a merit review. OWCP found that the submitted timeline was not new and relevant. It found that appellant's argument about the 2010 imaging study was an argument asking for a different interpretation of the medical evidence and did not constitute new or relevant evidence to support the argument that appellant was unable to perform the selected position.

On appeal, appellant's representative argues that the evidence submitted with his June 2011 reconsideration request was new, relevant and pertinent.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.² An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.³

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁴ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁵

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606.

⁴ *Id.* § 10.607(a).

⁵ *Id.* § 10.608.

ANALYSIS

OWCP's February 2, 2011 decision denying modification of the November 20, 2009 wage-earning capacity determination is the most recent merit decision of record. That decision provided appellant with the right to request reconsideration within one calendar year of the date of that decision, or by February 2, 2012. Appellant's representative explicitly exercised that right in June 2011. His reconsideration request is therefore timely.

The question for determination is whether appellant's request met at least one of the three standards for obtaining a merit review of his case. OWCP found that the selected position of customer service representative was medically suitable. It gave the weight of the medical evidence to a second-opinion physician who provided permanent work restrictions, and it noted that the attending orthopedic surgeon, Dr. Young, failed to complete a work capacity evaluation. To support his June 2011 reconsideration request, appellant submitted a September 3, 2008 work capacity evaluation completed by Dr. Young. As OWCP noted, the record did not previously contain a work capacity evaluation from Dr. Young. The September 3, 2008 evaluation, therefore, constitutes new evidence not previously considered by OWCP.

The evidence is also relevant and pertinent. It addresses appellant's permanent work restrictions. It is reasonably contemporaneous to the permanent work restrictions reported by the second-opinion physician, which OWCP used to select the position of customer service representative, yet it differs significantly in terms of whether appellant can work eight hours a day and how long appellant can sit. Both are relevant to whether appellant can perform the duties of a customer service representative, which is a sedentary position.

The Board finds that appellant's June 2011 reconsideration request provided evidence that constitutes relevant and pertinent new evidence not previously considered by OWCP. As it meets one of the standards for obtaining a merit review of his case, the Board finds that OWCP improperly denied his request. The Board will therefore reverse OWCP's July 2, 2011 decision and remand the case for a merit review and an appropriate final decision on whether the November 20, 2009 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that OWCP improperly denied appellant's February 2, 2011 reconsideration request. Appellant is entitled to a merit review.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2011 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action.

Issued: May 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board